IN THE

Supreme Court of the United States

October Term, 1958.

No. 39

PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

v.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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September 24, 1958.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

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CITATIONS

CASES:

IN THE

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v.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 12, 1958.

CITATION TO OPINIONS BELOW.

The opinion of the District Court, printed as Appendix A hereto (infra, p. 15), is reported at 155 F. Supp. 695. The opinion of the Court of Appeals, printed as Appendix B hereto (infra, p. 23), is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 12, 1958. This petition for writ of certiorari was filed less than 90 days after the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

QUESTION PRESENTED.

Does a District Court of the United States have jurisdiction over the subject matter of a claim for extra pay for services performed as a railroad employee, in a dispute arising under an existing collectively bargained railway labor agreement, solely because the claim is presented by an employee who has left active service; or is exclusive jurisdiction over such claim and dispute in the National Railroad Adjustment Board established under the Railway Labor Act?

STATUTES INVOLVED.

Pertinent provisions of the Railway Labor Act, 45 U. S. C., Secs. 151, 151a, 152, 153, are set forth in Appendix C to this petition, p. 32, infra.

STATEMENT OF THE CASE.

On April 11, 1955, respondent's decedent, Charles A. DePriest, a New Jersey resident, filed a complaint in the United States District Court for New Jersey against the petitioner, a Pennsylvania corporation, alleging that he had been employed by the petitioner from May 13, 1918, until March 10, 1955, at which time he resigned and applied for his annuity.

It was alleged that on March 1, 1941, the petitioner and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one (R. 1-2). The agreement provided, inter alia, that:

> "4-0-2. (a) Where regularly assigned to perform service within switching limits, yard engineers shall not be used in road service beyond such switching limits when road engineers are available, except in case of emergency. When yard engineers are used in road service beyond their switching limits under the conditions just referred to, they shall be paid miles or hours, whichever is greater, with a minimum of one

hour, for the class of road service performed beyond their switching limits, in addition to their regular day's pay and without any deduction therefrom for the time consumed in said service." (R. 2).

DePriest claimed that between February 1, 1948, and the time of his retirement he had performed road service outside his switching limits on between 1,000 and 1,500 occasions on the trackage of the Baltimore and Ohio Railroad on the Delaware River Waterfront which entitled him to compensation in the sum of $27,000 under his interpretation of the railway labor agreement aforesaid (R. 3-4). Under petitioner's interpretation of the contract DePriest did not go beyond his switching limits on such occasions and did not perform road service (R. 7).

DePriest also alleged that his claims were denied by the petitioner and that upon the occurrence of his retirement the National Railroad Adjustment Board had no jurisdiction of the matter and he accordingly was asserting his claims in this action in the District Court (R. 4).

Petitioner moved to dismiss the action for lack of jurisdiction over the subject matter and in support of its motion filed an affidavit stating that claims for alleged additional wages due similar to those being advanced by DePriest were filed against petitioner by two engineers, which after their death, were progressed by their administrators to the First Division of the National Railroad Adjustment Board where they were docketed and awaiting decision (R. 31-32). Petitioner also filed in support of the motion a certified copy of an award of the National Railroad Adjustment Board, First Division, wherein the Board took jurisdiction over a pay claim by a retired employee (R. 34-36). The motion to dismiss was denied with leave to the petitioner to request a reasonable stay of the trial pending determination of like issues between the other claim-

ants and the petitioner then before the National Railroad Adjustment Board (R. 37). The petitioner then filed its answer generally denying DePriest's claims and asserting eight defenses thereto, including the defenses that the Court was without jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 6).

Petitioner then moved for summary judgment on the ground that administrative remedies had not been exhausted or in the alternative sought an order staying proceedings pending a decision by the National Railroad Adjustment Board interpreting the basic agreement involved in this action (Appendix A, infra, pp. 16-17).

The District Court, after hearing the motions held that the action involved the construction of a contract between a railroad employer and a labor union which, under the provisions of the Railway Labor Act, was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that "the interpretation of the contract here will affect working conditions of present employees and may lead to labor strife, the very type of friction the National Railway Labor Act was designed to prevent." 145 F. Supp. 596, 599. On September 28, 1956, an order was entered by the District Court staying all proceedings until the Board decided the cases before it involving the same provisions of the contract in suit (Appendix A, infra, p. 17). DePriest appealed from this order to the United States Court of Appeals for the Third Circuit. DePriest died on February 11, 1957, and his administrator was substituted as plaintiff-appellant in the action. The Court of Appeals dismissed the appeal for want of appellate jurisdiction. 243 F. 2d 485. After argument in the Court of Appeals in this matter, but before the decision to dismiss the appeal for want of appellate jurisdiction, the National Railroad

Adjustment Board, First Division, made three awards denying claims in matters involving the interpretation of the contract here involved with respect to the same issue.

Petitioner then again moved the District Court to dismiss the complaint on the ground that the Court lacked jurisdiction of the subject matter (R. 9). In support of the motion petitioner attached certified copies of the three awards of the Board to which reference is above made (R. 10-21).

The District Court determined that the issue involved was one of interpretation of a collective bargaining railway labor agreement and that the question of interpretation was exclusively for the National Railroad Adjustment Board, 155 F. Supp. 695; Appendix A, p. 15, infra. The District Court then entered an order dismissing the complaint for want of jurisdiction over the subject matter (R. 29).

The Court of Appeals for the Third Circuit in the decision appealed from here vacated this order of the District Court and remanded the case for further proceedings. Appendix B, p. 31, infra. It held that the requirements of an ordinary diversity action were met and that the Railway Labor Act did not deprive the District Court of jurisdiction over a claim by a retired employee for additional compensation based on his interpretation of an existing collectively bargained railway labor agreement. It relied upon the authority of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941), which involved a common law action for wrongful discharge. The Court of Appeals said: "We see no reason to distinguish between this situation and one to recover for wrongful discharge." Thus, the District Court was held to have jurisdiction of this claim for extra pay, which is based on the interpretation of a railway labor agreement.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the Third Circuit in this case has decided an important question of federal law involving the Railway Labor Act in a way in conflict with the principles established by the decisions of this Court in *Railroad Trainmen v. Chicago River R. R.*, 353 U. S. 30 (1957); *State of California v. Taylor*, 353 U. S. 553 (1957); and *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255 (1950). Fundamentally, this question and conflict involves whether or not a claim for additional compensation for services as a railroad employee, based on the interpretation of a railroad collective bargaining agreement, is within the jurisdiction of the courts or is within the exclusive jurisdiction of the National Railroad Adjustment Board established under the Railway Labor Act.

In the *Railroad Trainmen*, *State of California* and *Order of Railway Conductors* cases, this Court held that under the Railway Labor Act the National Railroad Adjustment Board has exclusive jurisdiction of disputes which involve claims for additional compensation under railroad collective bargaining agreements. In the *Railroad Trainmen* case this Court reviewed the legislative history of the Railway Labor Act and held that it was generally understood that the provisions dealing with the Adjustment Board, 45 U. S. C. §153, First, "were to be considered as compulsory arbitration in this limited field". 353 U. S. 30, 39. In the *State of California* case this Court held that the Adjustment Board "was given jurisdiction over 'minor disputes', meaning those involving the interpretation of collective-bargaining agreements in a particular set of facts" and characterized Section 153, First, as "compulsory arbitra-

tion". 353 U. S. 553, 558, 559. This established doctrine was not followed, nor even mentioned, by the lower court in its opinion.

Instead, Judge Kalodner in writing the opinion below, relied heavily upon the authority of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941), in which a discharged employee was permitted to bring a common law action for wrongful discharge in court without resort to the Adjustment Board. The court below extended what it conceived to be the holding of the *Moore* case to cover the instant matter. It said it saw no reason to distinguish between a common law action for wrongful discharge and a claim for additional compensation under a collective bargaining agreement, where the claim was brought by a retired employee. This, despite the limitations on the scope of the decision in the *Moore* case and the clearly established distinction drawn by this Court in *Slocum v. Delaware L. and W. R. Co.*, 339 U. S. 239, 244 (1950), that "a common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide". In the instant case, manifestly the Board has power to provide a complete remedy.

However, though not perceiving any distinction here, the court below did recognize that in the light of this Court's decision in the *Slocum* case, "the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees". It is submitted that the court below erred in its holding that the instant dispute did not fall in the latter category.

The failure of the Court below to distinguish this claim for additional compensation under a collective bargaining

agreement, which is within the jurisdiction of the National Railroad Adjustment Board, from an action for wrongful discharge, and its holding that the District Court has jurisdiction of such claim, create an unwarranted exception to the doctrine established by this Court that the courts have no jurisdiction over those matters which Congress has committed to the jurisdiction of the National Railroad Adjustment Board.

The existence of this conflict in principle between the decisions of this Court and the court below warrants the grant of a writ of certiorari to resolve this important question involving the Railway Labor Act and the jurisdiction of the courts.

2. Clearly the dispute presented here involves an important question concerning the interpretation and application of the Railway Labor Act, particularly since the decision of the court below throws confusion into the administration of the statute by both the carriers in the industry and their employees.

The decision of the Court below allows an action in the federal courts which is inconsistent with the orderly procedure provided by Section 3, First, of the Railway Labor Act for the National Railroad Adjustment Board to determine disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." From the legislative history of Section 3, First, it is certain that the Adjustment Board was created to compel disputes over the interpretation of agreements such as presented by the respondent here, if processed beyond the carrier, to be taken exclusively to the Adjustment Board, absent a system board. To permit the jurisdiction of a federal district court to be invoked to decide a dispute as to the meaning of a wage provision of a railroad collective bargaining

agreement is to invade the exclusive jurisdiction over disputes of that type which Congress gave to the Adjustment Board. The position adopted by the court below rejects the basic assumption of the Railway Labor Act that disputes over the meaning of railroad collective bargaining agreements should be settled exclusively within the confines of the structures erected by the Act. It opens the door to conflicting interpretations of such agreements by the Adjustment Board on one hand and a variety of courts on the other, thereby dooming the uniformity, intended by Congress, which is attainable only within the statutory procedures. It would also lead to an unseemly race between parties in an effort respectively to choose the forum of their own selection.

Moreover, the decision below is not confined in its reach to pay-claims under existing agreements by retired employees.[1] The language used by the court would seemingly justify invoking the jurisdiction of a court whenever the active employer-employee relationship no longer existed, even though the dispute concerned rates of pay, rules or working conditions under the collective bargaining agreement. Such situations might involve claims by inactive employees on furlough, out of service because of illness or disability, absent in military service, voluntarily resigning, or out of active service for any other reason. Either the out of service employee or the Railroad might go into court to get an interpretation of the agreement. A veritable Pandora's box would thereby be opened, throwing into federal district courts or, for that matter, state courts,

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[1] This class alone is large. In 1956-1957 retired railroad employees receiving benefits under the Railroad Retirement Act totaled 361,000, as reported in the Annual Report (p. 1) of the Railroad Retirement Board for the fiscal year ended June 30, 1957, H. R. Doc. No. 278, 85th Cong., 2d Sess. 1 (1958). Many employees at retirement have claims or grievances pending against their employers.

a host of issues arising out of the disputed application and interpretation of collective bargaining agreements. Here again the basic and vital provision of the Act—the exclusiveness of the Act's procedures—would be grossly violated.

A claim for additional compensation by an employee who, subsequent to the completion of the incident out of which the claim arose, relinquishes his right to service, falls within the Act and must be brought before the Adjustment Board and cannot be taken in the first instance to any court in the land happening to have jurisdiction over the person of the defendant. In such a situation the Adjustment Board can give exactly the same remedy as a court. This was not true in the *Moore* case.

The holding of the court below leads to the conclusion that any railroad employee by retiring or resigning could by-pass the Adjustment Board and thus defeat and avoid the plan established by the Congress and confuse other employees having similar claims who are required to go before the Adjustment Board. Such an unrealistic approach would seem to do extreme violence to the announced plan of the Railway Labor Act to provide a procedure for interpreting labor contracts and settling disputes which would avoid those serious disruptions between carriers and employees often leading to strikes.

In addition, the decision of the court below that a retired employee may bring in court a wage claim based upon an existing collective bargaining agreement is at war with the established construction given the Railway Labor Act by the National Railroad Adjustment Board under which it has jurisdiction over pay-claims submitted by retired railroad employees.[2] While the lower court did not specifically decide whether the National Railroad Ad-

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[2] See, e. g., National Railroad Adjustment Board, First Division, Award 15406 (R. 34-36).

justment Board had concurrent jurisdiction with the courts or whether the courts alone had jurisdiction over claims by out-of-service employees, the opinion strongly implies that the latter view governed the decision. Such a holding would, of course, deprive retired and other out-of-service employees of the Adjustment Board remedy provided by the Railway Labor Act, and in view of the new limits on the diversity jurisdiction of the Federal courts as a practical matter would relegate most such claims to the state courts. The assumption of jurisdiction by the court below on any theory, if sustained, would make the administration of collective bargaining agreements in the whole railroad industry chaotic. This confusion is not only detrimental to the best interests of the carriers and their employees but is apt to cause disputes to develop into strikes, thereby hurting the general public and producing the evil which Congress sought to avoid. Since the decision below creates important and unwarranted exceptions to Section 3, First, review by this Court is essential.

3. The decision of the court below is believed to be in conflict with the principles upheld in the following decisions of the Courts of Appeal for the Fifth, Seventh and Tenth Circuits, which have held that where the dispute concerns a wage provision of a collective bargaining agreement made pursuant to the Railway Labor Act and can be resolved by an interpretation of the agreement, exclusive jurisdiction lies in the National Railroad Adjustment Board. *Sigfred v. Pan American Airways*, 230 F. 2d 13 (5 Cir. 1956), cert. den., 351 U. S. 925; *Buster v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 195 F. 2d 73 (7 Cir. 1952); *Walters v. Chicago & North Western Ry.*, 216 F. 2d 332 (7 Cir. 1954); *Switchmen's Union v. Ogden Union Ry.*, 209 F. 2d 419 (10 Cir. 1954), cert. den., 347 U. S. 989.

From numerous decisions in the federal district courts

and in the courts of appeal in the different circuits it is apparent that the exclusive jurisdiction of the Adjustment Board is determined by the nature of the claim or dispute arising under a collective bargaining agreement and by the status of the claimant at the time the incident arose. The court below in failing to recognize this distinction as the basis for the *Moore* case did not look at the nature of the claim nor the status of the plaintiff at the time the incidents occurred but only the status of the plaintiff after his voluntary retirement.

It is further submitted that the court below erred in relying upon the authority of the decision of the Court of Appeals for the First Circuit in *Cepero v. Pan American Airways*, 195 F. 2d 453 (1952), cert. den., 344 U. S. 840, rehearing den. 344 U. S. 882. The basic issue in the *Cepero* case was the validity, as distinguished from the interpretation, of a collective bargaining agreement, and the judgment of the district court dismissing the complaint was affirmed by the First Circuit with only the reservation that the lower court could inquire into a wrongful discharge issue if it felt justice so required. Thus, the *Cepero* case is clearly distinguishable from the instant matter, where neither the validity of a collective bargaining agreement nor an issue of wrongful discharge is involved.

The need for a clarifying construction of the Railway Labor Act in this respect is further shown by a recent district court case in the Northern District of Illinois where the Court, in determining that a system board had exclusive jurisdiction over a discharge case, uses the following language: "Furthermore, there is some doubt whether the Supreme Court would now adhere to its decision in *Moore* in view of its more recent opinion in *Brotherhood of Railroad Trainmen v. Chicago R. & I. Railroad Co.*, 353 U. S. 30, rehearing denied 353 U. S. 948, in which the Court read the Adjustment Board provisions of the Railway Labor

Act as constituting compulsory arbitration." See *Rossa v. Flying Tiger Line*, 42 Lab. Rel. Rep. (Ref. Man.) 2652 (N. D. Ill., June 26, 1958, not yet officially reported). The volume of the litigation in the district courts involving this area of the Railway Labor Act is a silent but powerful indication of the need to have the question raised by the decision of the court below reviewed at this time by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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September 24, 1958.

APPENDIX A.

OPINION OF COURT.

(Filed September 5, 1957.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

GEORGE M. DAY, Administrator ad litem of the Estate of Charles A. DePriest, deceased,

Plaintiff,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant.

APPEARANCES:

For Plaintiff: POWELL & DAVIS, Esquires, By JAMES M. DAVIS, JR., Esquire.

For Defendant: ARCHER, GREINER, HUNTER & READ, Esquires, By F. MORSE ARCHER, JR., Esquire.

MADDEN, District Judge:

On April 11, 1955, Charles A. DePriest filed a complaint in this court alleging that he had been employed as a locomotive engineer by the defendant, The Pennsylvania Railroad Company, from May 13, 1918 until March 10, 1955, when he retired. He further alleged that on March 1, 1941

the defendant-railroad company and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one, which provided, among other things, that if an engineer employed by the defendant operated a train over the trackage of a foreign railroad other than in an emergency, he performed a road service which entitled him to one day's pay in addition to the day's compensation to which he was entitled for services on the road of his employer. DePriest claimed that between February 1, 1948, when he was assigned to yard service, and the time of his retirement, he had performed services on between 1000 and 1500 occasions on the trackage of the Baltimore and Ohio Railroad which entitled him to compensation in the sum of $27,000. He alleged that his claims were denied by the defendant and that due to his retirement, the National Railroad Adjustment Board had no jurisdiction of the matter and he accordingly was asserting his claims in this action in this court.

The defendant moved to dismiss the action for lack of jurisdiction and in support of its motion filed an affidavit alleging that claims for additional wages under the same agreement had been filed against it before the First Division of the National Railroad Adjustment Board where they were presently awaiting decision. The motion to dismiss was denied with leave to the defendant to request a reasonable stay of the trial of this action pending determination of like issues between other claimants and the defendant then before the National Railroad Adjustment Board. Defendant filed answer and then moved for summary judgment on the ground that administrative remedies had not been exhausted or, in the alternative, sought an order staying all proceedings pending a decision by the National Rail-

road Adjustment Board interpreting the basic agreement involved in the case.

This court after hearing the motions held, in an opinion filed September 19, 1956, 145 F. Supp. 596, that the action involved the construction of a contract between a railroad employer and a labor union which under the provisions of the Railway Labor Act[1] was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that DePriest, although not a party to the claims pending before the Board, would be a person affected by any order of the Board in the matter, upon which an action could be maintained in the District Court, citing Kirby v. Penna. R. R. Co. (3 Cir. 1951) 188 F. 2d 793. On September 28, 1956 an order was entered by this court in conformity with its opinion retaining jurisdiction of the matter but staying all proceedings until the Board decided the cases presently before it involving the same provisions of the contract in suit. DePriest appealed this order and pending the appeal DePriest died on February 11, 1957 and his administrator has been substituted as plaintiff.

On April 17, 1957, the Court of Appeals (for this Circuit) through Judge Maris, filed an opinion, 243 F. 2d 485, holding that the order of September 28, 1956 was not appealable and the appeal would be dismissed but, likewise, suggesting to this court that upon plaintiff's application it might be well to modify the stay provisions of the order so that all pre-trial preparations might be completed and the matter ready for trial in the event of favorable disposition by the National Railroad Adjustment Board.

Immediately both plaintiff and defendant moved by appropriate motions before the court, the plaintiff for a modification of the stay order, the defendant on a motion to dis-

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[1] 45 U. S. C. A., Section 151, et seq.

miss. The defendant's motion to dismiss was bottomed upon this court's previous opinion in the matter, together with the determination in Awards 18115, 18116 and 18117 of the First Division National Railroad Adjustment Board, which determinations were made March 15, 1957 (after argument before the Court of Appeals in this matter but before determination).

Inasmuch as this court had filed an opinion in another matter involving the question of jurisdiction between the courts and the National Railroad Adjustment Board; Re: Belford Barnett, plaintiff v. Pennsylvania-Reading Seashore Lines, respondent, 145 F. Supp. 731, and that such matter had, likewise, been appealed to the Court of Appeals, and that argument had been had thereon on April 17, 1957, the court adjourned the matter until disposition of the Barnett matter by the Court of Appeals.

On May 28, 1957, the Court of Appeals, through Judge Goodrich, filed an opinion in the Barnett matter, supra, and these motions were then argued before this court on June 7, 1957.

An examination of defendant's motion discloses certified copies of the awards in three cases, all claims against the Pennsylvania Railroad Company, in the one, award 18115, Thomas J. Finlin, in the second, award 18116, and in the third, award 18117, all having in issue the interpretation of the very contract and the same factual circumstances involved in the present case, so we are confronted directly with the issue: Under these circumstances, does the National Railroad Adjustment Board have exclusive jurisdiction for the interpretation of the contract?

In its previous opinion in this matter, 145 F. Supp. 596, this court said:

> "If the interpretation of the pending matters on this question by the administrative body is against the

claimants thereunder, is it binding upon this Court in the present matter? We think so, under the authority of the Slocum case, supra, and Newman v. Baltimore and Ohio Railroad Co., 3rd Cir. 1951, 191 F. 2d 560."

If the present status of the law on this subject is the same, this statement would seem dispositive of the matter, at the same time the court is reluctant to take its own statement as sole authority for so holding.

In the DePriest case (Day v. Penna. R. R. Co.) supra, Judge Maris said:

"* * * On the contrary the stay here was sought merely because of the rule of law laid down by the Supreme Court in Slocum v. Delaware L. & W. R. Co., 1950, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and Order of Railway Conductors of America v. Southern Railway Co., 1950, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811, that the National Railroad Adjustment Board has exclusive jurisdiction to decide the question raised in this case as to the construction of the labor agreement here sued on."

And further:

"* * * Nor can we ignore the fact *that even if the plaintiff's right is established by the board* the amount of the claim at least may well have to be established in the present action in the district court. We, therefore, think it not inappropriate to suggest that the district court, upon plaintiff's application, may well be moved to modify the existing stay of proceedings to the extent necessary to permit the parties to undertake depositions, discovery and other pre-trial procedure in order that the evidence which is now available may be preserved for *use at the trial of the action when and if it takes place.*" (Emphasis supplied.)

To this court this at the very least creates an inference that Judge Maris was of a mind that the determination by the National Railroad Adjustment Board if it was against the position of the present plaintiff, was final.

In Barnett v. Pennsylvania-Reading Seashore Lines, supra, Judge Goodrich said:

> "* * * A legislative policy permitting court re-examination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. This statutory scheme does not.
>
> "The view just expressed, that there can be no judicial review when the Board fails to give relief to an employee, is that of other courts which have had occasion to examine the question. Sometimes the conclusion is put on the basis that the statute giving the Board's order finality means what it says. No review is provided for and that is the end of it. Reynolds v. Denver & R. G. W. R. Co., 174 F. 2d 673 (10th Cir. 1949); Weaver v. Pennsylvania R. R., 141 F. Supp. 214 (S. D. N. Y. 1956); Greenwood v. Atchison, T. & S. F. Ry., 129 F. Supp. 105 (S. D. Cal. 1955); Futhey v. Atchison, T. & S. F. Ry., 96 F. Supp. 864 (N. D. Ill. 1951); and Berryman v. Pullman Co., 48 F. Supp. 542, 543 (W. D. Mo. 1942), where the court said: 'That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts.' Occasionally res judicata is given as the reason. Ramsey v. Chesapeake & O. R. Co., 75 F. Supp. 740 (N. D. Ohio 1948). Other decisions put the result squarely upon the election of remedies theory. Plaintiff having chosen to go to the Board, he cannot now, after losing, come to a court. Majors v. Thompson, 235 F. 2d 449 (5th Cir. 1956); Michel v. Louisville & N. R.

Co., 188 F. 2d 224 (5th Cir.), cert. denied, 342 U. S. 862 (1951); cf. Kelly v. Nashville, C. & St. L. Ry., 75 F. Supp. 737 (E. D. Tenn. 1948) (court action brought while proceedings were pending before the Board).

"Regardless of the path taken judicial authority arrives at the same place. The cases which preserve the possibility of court review if the Board has acted unconstitutionally or has gone outside its jurisdiction should be kept in mind. But they are not in point in this case which is a plain challenge to the decision reached by the Board on the merits of the plaintiff's claim."

This view seems also to be the opinion of the Fifth Circuit for in the matter of Sigfred v. Pan American World Airways, 1956, 230 F. 2d 13, Judge Tuttle, speaking of the National Railroad Adjustment Board and the National Air Transport Adjustment Board, said at page 17:

"In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore, giving normal effect to these words, we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of its proceeding.

"However, it was urged upon the district court that the system board's construction of the agreement is arbitrary and capricious. If we regard this as an assertion that the board's arbitrariness rose to the level of a denial of due process, it is not amiss to add that we regard the board's interpretation of the agreement not only entirely reasonable, but we believe it to be the correct interpretation."

And further (page 18):

> "The interpretation of such an agreement was held by the Slocum case to be within the exclusive jurisdiction of the statutory board there involved."

It is, therefore, the opinion of this court that the National Railroad Adjustment Board had the contract in question in the present case before it for interpretation in like circumstances; that the present plaintiff did not necessarily have to appear before such Board under the holding of Kirby v. Pennsylvania R. R., supra; and that the question of interpretation of the labor agreement was exclusively in the National Railroad Adjustment Board and its finding is final and binding upon the plaintiff in this case.

Consequently, the defendant's motion to dismiss will be granted and it, therefore, becomes unnecessary to consider the motion of plaintiff to modify the stay.

Counsel will prepare an appropriate order.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 12,462—October Term, 1957.

(Argued April 1, 1958. Decided August 12, 1958.)

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,

Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD CO.

Before: KALODNER and HASTIE, Circuit Judges and LAYTON, District Judge.

By KALODNER, Circuit Judge:

The substituted plaintiff appeals from an Order entered against him in the District Court dismissing the complaint originally filed by his decedent.

Details of the action, proceedings, and contentions of the parties are set forth in prior opinions of the District Court and this Court[1] as well as in 155 F. Supp. 695, which immediately preceded this appeal.

Briefly stated, Charles A. DePriest commenced this action for damages against the defendant railroad asserting that pursuant to a collective bargaining agreement, and during his employment by the defendant railroad as a locomotive engineer, he was entitled to compensation greater than that actually paid to him. The complaint recited that DePriest had processed his claim through the defendant's organization, but did not proceed to the National Railroad Adjustment Board because he retired and severed his employment relationship. Although defendant's answer denied that DePriest's claim was administratively rejected by its general manager, it admitted that he was an employee in the period involved and averred that he relinquished all rights to return to service and had applied for his annuity.

Following our dismissal, for want of appellate jurisdiction, of the prior appeal of the decedent, 243 F. 2d 485, the plaintiff moved to modify the stay order entered by the District Court. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter. In support of the motion, defendant attached certified copies of three Awards made by the National Railroad Adjustment Board, First Division, in independent matters, all involving interpretation of the contract here involved with respect to the same issue. These Awards denied relief to the claimants; they were entered by the Board shortly before we rendered our decision on the prior appeal.

The District Court determined that the issue involved

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[1] **DePriest v. Pennsylvania R. Co.**, 145 F. Supp. 596, appeal dismissed, sub nom. **Day v. Pennsylvania R. Co.**, 243 F. 2d 485 (1957).

was one of interpretation of a collective bargaining agreement; that the question of interpretation was exclusively for the National Railroad Adjustment Board and that its finding was final and binding upon the plaintiff. 155 F. Supp. 695. Although the Opinion of the District Court proceeded upon an inquiry into the binding effect of the aforementioned Awards, which would presuppose jurisdiction, the Order actually entered dismissed the complaint for want of jurisdiction.

The questions now presented for disposition are whether the cause was within the jurisdiction of the District Court, and, if it was, whether the plaintiff is barred by the Awards submitted in support of defendant's motion.

We are of the opinion that the District Court was not without jurisdiction in the premises and that, at this stage of the action, it does not appear that the plaintiff is or should be barred from further proceedings.

There is no dispute here that the requirements of an ordinary diversity action are met. If the District Court is deprived of jurisdiction, that must appear from the provisions of the Railway Labor Act, 48 Stat. 1185, c. 691, 45 U. S. C. Section 151, et seq.

The term "employee" is defined in Section 1 Fifth of the Act, 45 U. S. C. Section 151 Fifth, to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner or rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . " Further, Section 3 First (i) of the Act, 45 U. S. C. Section 153 First (i), grants to the National Railroad Adjustment Board jurisdiction to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . "

In this statutory framework, the United States Supreme Court permitted an employee who claimed to have been wrongfully discharged to maintain an action at law without resort to the Adjustment Board even though a question of interpreting a bargaining agreement was presented. Moore v. Illinois Central R. Co., 312 U. S. 630 (1941). The Court there said at page 634:

> "[We] find nothing in that [Railway Labor] Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

In Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 (1950), the railroad, having a dispute with two unions concerning the scope of their respective agreements, commenced an action for declaratory judgment, praying for an interpretation of both agreements. The Supreme Court emphasized the declared purpose of the Railway Labor Act, and noted that settlement of the dispute "would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties." 339 U. S. at page 242. Accordingly, it held that the jurisdiction conferred upon the Adjustment Board was exclusive, and that the courts were without power to adjudicate such a dispute.

As to the Moore decision, the Court pointed out:

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract.

As we held there, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U. S. at page 244.

In the light of these decisions, the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees. For example, see Newman v. Baltimore & Ohio R. Co., 191 F. 2d 560 (3rd Cir. 1951); Switchmen's Union of North America v. Ogden Union Ry. & Depot Co., 209 F. 2d 419 (10th Cir. 1954), cert. den. 347 U. S. 989; Alabaugh v. Baltimore & Ohio R. Co., 222 F. 2d 861 (4th Cir. 1955), cert. den. 350 U. S. 839; Majors v. Thompson, 235 F. 2d 449 (5th Cir. 1956).

The Railway Labor Act relates to disputes between employees and carriers. Its broad purposes are set forth in the Slocum decision:

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' . . . This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. . . The plan of the Act is

to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

"In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the [May 20], 1926 Act provided for creation of various Adjustment Boards . . . But this voluntary machinery proved unsatisfactory, and in 1934 Congress . . . passed an amendment . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements . . . Precedents established by it [the Adjustment Board] while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." 339 U. S., pages 242-243.

As already indicated, it was precisely along these lines that the Moore case was distinguished.

Here, as in the Moore case, the employer-employee relationship has been terminated; the substantive issue is whether something is owing to the plaintiff. While the court may have to consider a provision of a bargaining

agreement, its interpretation would have no binding effect upon future interpretations by the Board, and the future relations between the carrier and its other employees are not involved. Since the claimant in the Moore, or in the instant, situation, is not an employee, there does not exist the unhappy discontent among co-employees because of dissimilar treatment for similar work.

We see no reason to distinguish between this situation and one to recover for wrongful discharge.[2] Cepero v. Pan American Airways, 195 F. 2d 453, 455 (1st Cir. 1952), cert. den. 344 U. S. 840.

We reach, then, the issue discussed by the District Court in its Opinion, that is, whether the plaintiff is bound by the separate awards of the Adjustment Board denying the independent claims of three employees with respect to a similar substantive issue.

The effect of the motion of the defendant in this regard is that of a motion for summary judgment, and upon clearly settled principles such motion may be granted only where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Rules 12(b) and 56, Federal Rules of Civil Procedure.[3]

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[2] In **Sigfred v. Pan American World Airways,** 230 F. 2d 13, 18 (5th Cir. 1956), the plaintiff had submitted his claim to the Adjustment Board, which denied it. The Court held that no reviewable question of law was presented with respect thereto. As to the jurisdiction of the Court, see the dissenting Opinion of Judge Brown, 230 F. 2d 19, 22-23.

However, in the case sub judice we are not presented with a similar situation. Rather, we are concerned with the issue, whether the jurisdiction of the Board is exclusive with respect to a controversy not yet submitted to it.

[3] **Lawlor v. National Screen Service Corporation,** 238 F. 2d 59, 65 (3rd Cir. 1956), cert. granted, judgment vacated (on other grounds) 352 U. S. 992 (1957); **Sherwin v. Oil City National Bank,** 229 F. 2d 835, 837 (3rd Cir. 1956); **Frederick Hart & Co. v. Recordgraph Corporation,** 169 F. 2d 580, 581 (3rd Cir. 1948).

In support of its motion, the defendant has attached certified copies of the three Awards upon which it relies. But these do not show that the plaintiff or his decedent was a party to any of them, or that either received due notice. Indeed, the recitation in the Awards of the parties to the proceedings does not include the plaintiff or the decedent. It is difficult to see that on such a presentation the defendant should be entitled to summary judgment in its favor. Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711 (1945).

The District Court relied upon our decisions in Kirby v. Pennsylvania R. R. Co., 188 F. 2d 793 (1951), Barnett v. Pennsylvania-Reading Seashore Lines, 245 F. 2d 579 (1957), and the decision on the prior appeal in this case, 243 F. 2d 485 (1957). However, the Kirby case involved the right of an employee to take advantage of an Award *against* a carrier where he was able to demonstrate that he was a member of the class for whose benefit the Award was made. The Barnett case involved the finality of an Award in a proceeding to which the employee-plaintiff was a party. Neither case involved or disposed of the issue presented here. The prior appeal in this case was dismissed because the Order of the District Court, which stayed the action pending disposition of the three proceedings above referred to by the Board, was interlocutory and not appealable. We did suggest, 243 F. 2d at page 487, that the District Court might permit discovery and other pretrial proceedings, since "even if the plaintiff's right is established by the Board the amount of the claim at least may well have to be established in the present action in the District Court." This was consistent with the Kirby case but even then merely assumes the plaintiff might bring himself within its operation. Our decision does not hold, and does not suggest, that a negative Award, in a proceeding to which the claimant is not a party and of which he does not receive notice, is binding upon him.

This does not mean that the Board's interpretation of the collective bargaining agreement should be ignored or taken lightly. Justice Rutledge put the matter in useful perspective in Washington Terminal Co. v. Boswell, 124 F. 2d 235, 241 (D. C. Cir. 1941), where he said:

> "The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony."

For the reasons stated, the Order of the District Court will be vacated and the cause remanded for further proceedings not inconsistent herewith.

APPENDIX C.

RELEVANT STATUTORY PROVISIONS.

Sections 1, 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1186, 1189, 54 Stat. 785, 786, 64 Stat. 1238; 45 U. S. C. §§151, 151a, 152, 153) provide in part as follows:

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric

power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

* * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

* * *

"Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

"Section 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after the approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any

original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive

from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective, and, if the award includes

a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

* * *